

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

CUSTOM Appeal No. 11737/2015-SM

(Arising out of OIA-MUN-CUSTOM-000-APP-056-057-15-16 dated 27/05/2015 passed by Commissioner of CUSTOMS-MUNDRA)

Shyam Timber Private Limited

232/1, New Nagori Plot, Galpadar Road,
Gandhidham, Kutch, Gujarat.

.....Appellant

VERSUS

C.C.-Mundra

Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra,
Mundra, Kutch, Gujarat-370421.

.....Respondent

With

CUSTOM Appeal No. 11738/2015-SM

(Arising out of OIA-MUN-CUSTOM-000-APP-056-057-15-16 dated 27/05/2015 passed by Commissioner of CUSTOMS-MUNDRA)

Pravinbhai Shantilal Jethwa

Director, Shyam Timber Private Limited.,
232/1, New Nagori Plot, Galpadar Road,
Gandhidham,,Kutch,Gujarat.

.....Appellant

VERSUS

C.C.-Mundra

Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra,
Mundra, Kutch, Gujarat-370421.

.....Respondent

APPEARANCE:

Shri Hardik Modh, Advocate for the Appellant

Shri Sanjay Kumar, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

Final Order No. 10142-10143/2024

DATE OF HEARING: 03.01.2024

DATE OF DECISION: 11.01.2024

RAMESH NAIR

1. The Appellants herein challenge the impugned Order-in-Appeal Nos. KDL/Custom-000-APP-056 to 057-15-16 dated 27.05.2015 passed by the Ld. Commissioner (Appeals) whereby he dismissed the appeals preferred by the Appellants and upheld the Orders-in-Original passed by the Joint Commissioner of Customs demanding for recovery of erroneous refund granted to the Appellants under proviso to Section 28 to the Customs Act with imposition of penalties equal to the amount of refund erroneously granted with interest. The Ld. Commissioner (Appeals) completely relied upon the Order-

In-Original passed by the Adjudication Authority for dismissal of the appeals without appreciating the submissions made in the appeal preferred before him.

1.1. The Ld. Joint Commissioner confirmed and ordered for recovery of erroneous refund granted to the Appellant mainly on the following premises:

- I. The Appellant submitted sales invoices with the refund claims pertaining to sale of timbers which were imported through Bills of Entry on payment of SAD. Number of logs declared in the Bill of Entry did not match with the number of logs shown in the sales invoices issued to the customers in domestic market even though cubic meter (CBM) mentioned in the sales invoices matched with the Bills of Entry;
- II. Description of the imported goods declared in the Bills of Entry does not match with the description mentioned in the sales invoices;
- III. In some cases, sale invoices filed with the refund claims did not mention number of logs whereas sales invoices seized from the premises of the Appellant at the time of search, declared log numbers and therefore, it appears that the Appellant generated another set of Invoices which were to be provided to the customs department and the customers;
- IV. There was no correlation in the number of logs imported and corresponding number of logs sold which led to an inference that the logs did not pertain to that particular Bill of Entry as otherwise they would have matched.

Being aggrieved by the impugned order the appellant filed the present appeals.

2. Shri Hardik Modh learned counsel appearing on behalf of the appellant at the outset submits that absolutely identical facts in the appellants own case this Tribunal has passed the order No. A/10866/10869/2023 dated 12.04.2023. It is the submission that there is 1 consignment out of which partly imported at Mundra Port and in the present case partly imported at Kandala Port, Identical case in respect to the import made at the Mundra Port Tribunal has already decided by the aforesaid order dated 12.04.2023 in favour of the appellant. Therefore, the issue in the present case is no longer res integra accordingly this appeal be allowed the following tribunal order dated 12.04.2023. He also placed reliance on the following judgments:-

- Doothat Tea Estate Kanoi Plantation (P) Ltd. Versus C.C.E., Shillong Kolkata) 2001 (135) E.L.T. 386 (Tri. Kolkata)
- S.K. Timber & Company Versus Commissioner Of Customs (Port), Kolkata - 2021 (377) E.L.T. 454 (Tri. - Kolkata)
- Chakrapani Vyapar Pvt. Ltd. Versus Commissioner of Cus., Bangalore - 2019 (370) E.L.T. 947 (Tri. - Bang.)
- M/s Technova Imaging Systems Pvt. Ltd. Versus Commissioner Of Customs, ACC Mumbai - 2022 (6) TMI 1091 - CESTAT MUMBAI
- Johnson Lifts Pvt. Ltd. Versus Asstt. Commr. Of Cus. (Refunds), Chennai - 2021 (2) TMI 401 - MADRAS HIGH COURT
- P.P. Products Ltd. Versus Commissioner Of Customs, Chennai - 2019 (367) E.L.T. 707 (Mad.)
- Agarwalla Timbers Pvt. Ltd. Versus Commissioner Of Customs, Kandla - 2014 (299) E.L.T. 455 (Tri. - Ahmd.)
- Commissioner Of Customs Versus Variety Lumbers Pvt. Ltd. - 2014 (302) E.L.T. 519 (Guj.)
- Commissioner Of Customs Versus Variety Lumbers Pvt. Ltd. - 2018 (360) E.L.T. 790 (S.C.)

3. Shri Sanjay Kumar, learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. I have carefully considered submissions made by both the sides and perused the record. I find that the dispute involved in the present case for recovery of the erroneous refund which was granted under Notification No. 102/2007-CUS is identical to the case decided by this Tribunal vide order dated 12.04.2023 (supra) the said order is reproduced below:-

"All these appeals have been filed by the appellant against the Order- in-Appeal Nos. KDL-CUSTM-000-APP-356 to 360-14-15 dated 28.08.2014 under which four Orders-in-Original passed by the adjudicating authority have been upheld. Learned Adjudicating authority has rejected refund claims filed by the appellants under Notification No. 102/2007-Cus., dated 14-9- 2007.

02. The facts of the case are that the appellants had filed refund claims of additional duty of customs which were sanctioned to the appellant vide various Orders-In-Original. Based on the information gathered that Appellant had claimed refund of 4% SAD that had been paid at time of import of timber incorrectly by submitting sale invoice of timber imported under some other Bill of Entry, a search was carried out at the business premises of the appellants by the DGCEI. On the basis of the DGCEI's Investigation report, show cause notices were issued to the Appellants. In adjudicating, the adjudicating authorities took

the view that the appellants have submitted forged documents with the customs authority with a view to get the refund fraudulently. They did not declare the factual position and suppressed the material facts i.e, clearance of different timber which did not pertain to the Bill of Entry for which they claimed refunds, preparation of forged invoices etc. These facts come to the notice of the department only after initiation of investigation against them. By adopting such modus operandi they received amounts, which otherwise would not have been sanctioned to them and thereby they contravened the provisions of Section 27 of Customs Act, 1962 read with the provisions of Notification No. 102/2007-Cus dated 14.09.2007. Therefore, extended period of recovery of refunds so sanctioned erroneously to them were invoked in these cases. The adjudicating authority passed the following impugned orders by denying the benefit under Notification No. 102/2007-CUS dated 14.09.2007 and ordered for recovery of erroneously granted refunds under provisions of Section 28 of the Customs Act, 1962, ordered recovery of interest under provisions of Section 28AB of Customs Act, 1962, and imposed penalty under Section 114A and 114AA of the Customs ACT, 1962.

S.No.	Name of Appellant	OIO No. and date	Demand
1.	Shyam Timber Pvt. Ltd.	KDL /ADDL/SS/558/REF/2014 dated 07.05.2014	Refund of Rs. 32,28,378/-
2.	M/s Miteshkumar J.& Co.	KDL/DC/NC/99/Ref/14 dated 20.03.2014	Refund of Rs. 91,509/-
3.	M/s Shri Miteshkumar V. Thakkar	KDL/DC/NC/99/Ref/14 dated 20.03.2014	Refund of Rs. NIL. Only penalty imposed
4.	Shree Pravinbhai S. Jethwa	KDL/ADDL/SS/558/Ref/14 dated 07.05.2014	Refund of Rs. NIL. Only penalty imposed

2.1 Being aggrieved by the above orders of lower authorities, appellants filed the appeals before the Commissioner of Customs (Appeals), Ahmedabad who vide common impugned Order-In-Appeal upheld the above order-in-originals and dismissed the appeals of appellants. Being aggrieved, the appellants are now before the Tribunal.

03. Shri Hardik Modh, learned counsel appearing for the appellants submits that Learned Commissioner (Appeals) erred in upholding the Orders-In-Original for recovery of refund of SAD under provisions of Section 28 of the Act along with interest and penalty amounts under Section 114AA of the Act. The Learned Commissioner (Appeals) ought to have appreciated the facts that appellant sold the SAD paid imported timber after payment of VAT/Sales Tax. The Learned Commissioner (Appeals) ought to have appreciated that the Appellant complied with all the condition laid down in the said Notification and therefore the refund amount ought not to have been demanded from the appellant.

Since the impugned order is misconceived both on facts and in laws, the impugned order is not Sustainable in the eyes of law.

3.1 He also submits that the Learned Commissioner (Appeals) ought to have appreciated that merely not mentioning a Bill of Entry number or CBM on invoices submitted to the Forest Department and subsequently to customers, does not mean that the Appellant did not sell the imported goods on which SAD was paid. The Appellant did not mention a Bill of Entry Number on the invoices issued to the customer due to keeping the imported price confidential. Had the appellant indicated a Bill of Entry Number over the invoices issued to customer, the customers would have easily known the price of imported goods, which would impact on the business of the Appellant. Appellant did not own any saw mill and used the Gandhidham premises only for storage of imported timber logs. The revenue failed to appreciate the fact that the Appellant imported round as well as sawn timber and sold the same after paying duty and therefore the condition of the Notification are satisfied.

3.2 He further submits that revenue has to appreciate that the Appellant filed the refund claim before the Customs authority along with all the requisite documents. The Appellant even annexed a statement showing details of import of timbers and clearances of the same to the customers on payment of VAT/Sales Tax and the statement was duly certified by the Appellant. This fact demonstrates that even though CBM was differently mentioned over the invoices submitted to the forest department and supplied to customers, it does not mean that the appellant did not sell the imported timber. Appellant complied with all the conditions of Notification No. 102/2007 and therefore, the revenue erred in demanding refund of SAD.

3.3 He argued that it is not the case of the department that the appellant procured non duty paid goods from domestic market and sold it to customer in guise of imported goods. The Appellant engaged in import of timber in logs and sold the same to buyer on payment of SAD and therefore they have not violated any of the condition of the Notification No. 102/2007. Once the appellant discharged their burden that they rightly claimed refund of SAD under the said Notification, the benefit of the said notification cannot be denied unless department show positive evidence regarding non fulfilment of condition of the said Notification. In the present case, the entire case has been made against the appellant only on the premise that CBM and description mentioned in the invoices has not been matched with CBM and description mentioned in the Bills of Entry.

3.4 He also submits that Learned Commissioner (Appeals) ought to have appreciated that the Appellant submitted all requisite documents viz., Invoice, bill of entry for issuance of T.P. by the Forest Department. After submitting all these relevant

documents, the Forest Department issued T.P. which travelled along with goods supplied to the Customers. Details mentioned in the T.P. correlate all the details mentioned in the invoices submitted to the customs department except Bill of Entry Number. Since description of the invoices submitted to the customs tailed with description mentioned in the invoices to the customers, refund cannot be denied merely not mentioning Bill of Entry number. In the absence of the condition of mentioning accurate CBM over the invoices issued to the Customers, the department cannot deny refund by holding that invoices issued to the customers do not mention the accurate CBM by relying upon the circular issued by Central Board of Central Excise & Customs. Notification itself does not provide for any condition, such a condition cannot be imposed by subsequent circular. He placed reliance on the decision of *Inter Continental (India) Vs. Union of India - 2003 (154) ELT 37 (Guj.)*

3.5 He further submits that Shri Pravinbhai Shantilal Jethwa did not admit in his statements recorded on 22.07.2010 and 29.02.2012 that the imported goods on which SAD was paid, was not sold in India after payment of sales tax. He only mentioned that they mentioned CBM and description inaccurately. The contents of the statement do not reveal that Appellant had fraudulently filed refund claim to obtain refund of SAD. The appellant did not alter the details of invoice number and date, quantity and rate, description of the goods, value of the goods, details of buyers and amount of VAT/Sales Tax paid. Not having endorsement of Bill of Entry Number does not mean that the appellant did not comply with the conditions of the said Notification. The revenue ought to have appreciated that the Notification does not have any condition regarding endorsement of Bill of Entry number over the invoices submitted to the customers. In absence of such conditions, the revenue cannot add any condition by way of circular or order.

3.6 He also argued that Learned Commissioner (Appeals) ought to have appreciated that refund orders passed by the Assistant Commissioner (Refund) attained finality. The Assistant Commissioner after going through all the conditions of the Notification and documents submitted by the appellant held that the appellant were eligible for refund and the said order has not been challenged further. Since the refund order attained finality the department ought not have issued the show cause notice for recovery of refund without challenging the refund order before higher forum. The Learned Comm.(A) ought to have appreciated that by not mentioning Bill of Entry Number accurately and number of pieces on the invoice and by not endorsing the invoice under Section 3(5) does not mean that the department can re-open the entire claim without challenging the refund order before the Higher Forum. He placed reliance on the following decisions:-

- *PRIYA BLUES INDUSTRIES LTD. VS. CCE 2004 (172)ELT 245(SC)*

- CCE VS. FLOCK INDIA (PVT) LTD. 2000(120)ELT 285 (SC)

3.7 He also argued the matter on limitation and submits that Learned Commissioner (Appeals) erred in upholding the Order-In-Original passed by the adjudicating authority without giving finding on limitation. The Commissioner (Appeals) ought to have passed speaking order on applicability of limitation based on submission made in memo of appeals. Since the impugned order has not given any finding on limitation, the same deserves to be quashed and set aside in the interest of justice.

3.8 He further placed reliance on the following judgments in support of their above contentions.

- DOOTHAT TEA ESTATE KANOI PLANTATION (P) LTD. VS. CCE, SHILONG 2001(135) ELT 386 (TRI. KOLKATA)
- S.K. TIMBER & COMPANY VS. COMMISSIONER OF CUSTOMS (PORT), KOLKATA - 2021 (377)ELT 454 (TRI. KOLKATA)
- CHAKRAPANIVYAPARPVT. LTD. VS. COMMISSIONER OF CUS., BANGALORE - 2019(370) ELT 947 (TRI. BANG.)
- M/S TECHNOVA IMAGING SYSTEMS PVT. LTD. VS. COMMISSIONER OF CUSTOMS, ACC MUMBAI - 2022 (6) TMI 1091 -CESTAT MUMBAI
- JOHNSON LIFTS PVT. LTD. VS. ASSTT. COMMR. OF CUS. (REFUNDS), CHENNAI -2021 (2)TMI 401-MADARA HIGH COURT.
- P.P. PRODUCTS LTD. VS. COMMISSIONER OF CUSTOMS, CHENNAI - 2019(367)ELT 707 (MAD.)
- AGARWALLA TIMBER PVT. LTD. VS. COMMISSIONER OF CUSTOMS, KANDLA - 2014(299) ELT 455 (TRI. AHMD.)
- COMMISSIONER OF CUSTOMS VS. VARIETY LUMBER PVT. LTD. - 2014(302) ELT 519 (GUJ.)
- COMMISSIONER OF CUSTOMS VS. VARIETY LUMBERS PVT. LTD. - 2018(360) ELT 790 (SC)

3.9 As regard the imposition of penalty on the appellants he submits that in the absence of mala fide intention on behalf of the appellants penalty cannot be imposed.

04. On other hand against this, Shri Tara Prakash, learned Deputy Commissioner (AR) reiterated the findings in the impugned order and submits that the claim of the appellants has been rightly rejected by the authorities.

05. I have heard both the sides and perused the records carefully. The issue involved is whether the appellants are eligible for the refund of SAD paid on imported timber under Notification No. 102/2007 The relevant notification reads as follows :-

"GOVERNMENT OF INDIA

*MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)*

Notification No. 102/2007-Customs

New Delhi, the 14th September; 2007

G.S.R. (E) - In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax; as the case may be;

(e) the importer shall, inter alia, provide copies of the following documents along with the refund claim :

(1) document evidencing payment of the said additional duty;

(i) Invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled.

On perusal of the para 3 of above Notification it is clear that jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in above notification are fulfilled. In the present case it is on record that Appellants filed the refund applications which covered all the requisite documents and details. The Assistant Commissioner (refund sanctioning authority) after examining the documents and details related to the refund claim and after satisfying himself that the conditions of notification are fulfilled by the appellants, sanctioned the refund and passed the refund order. Therefore, in the light of this facts the subsequent proceeding of department, in the present matter for recovery of refund amount by issuing show cause notices on the ground that the conditions of Notification has not been fulfilled by the appellants is unjustified.

5.1 It is observed that against the Orders sanctioning their refund claim, the revenue had filed appeal before the Commissioner (Appeals) who vide Order in Appeal No.38 to 235/2013/CUS/COMMR(A)/ dated 14.03.2013 dismissed the revenue's appeal. Being aggrieved by the Order-In-Appeal dated 14.03.2013 revenue further taken up the matter before the CESTAT and the CESTAT vide order dated 30.10.2013 upheld the sanction of the refund and dismissed the revenue's appeal. The said tribunal's order was not further challenged by the revenue therefore, the orders sanctioning the refund attained finality. In this circumstances, the refund sanctioned by

the original authority being attained finality upto the CESTAT cannot be called as erroneous refund therefore, the proceeding for recovery of the said refund treating as erroneous is absolutely illegal and unwarranted in the eyes of law. In the present matters Show cause notices have been issued under Section 28 of the Customs Act to recover the amount refunded vide earlier Orders with the presumption that the refund was erroneously granted to the assessee. The issue whether or not the refund has been erroneously granted would have to be decided in the manner provided in law. Since the sanction of refund has been held legal and correct as per the tribunal's order, the said refund cannot be treated as erroneous therefore, no show cause notice should have been issued consequently, no order for recovery could have been passed to give color of erroneous to any refund. The revenue has to challenge the refund order and in the present case the same was indeed challenged but not succeeded to hold the refund as erroneous in the light of the tribunal's decision. The revenue has not further challenged the CESTAT's order before the High Court despite the statutory appeal lies against the tribunal order. The similar issue has been considered recently COMMISSIONER OF CENTRAL EXCISE, MUMBAI-I Vs. M/s. MORARJEE GOKULDAS SPG. & WVG. CO.LTD. in Civil Appeal No. 3039 of 2011 wherein, the Hon'ble Apex Court in its order dated 24th March, 2023 passed the following judgment:-

7. The short question which is posed for consideration before this Court is whether Notice under Section 11A of the Central Excise Act is necessary for the recovery of the amount when the refund granted is reviewed under Section 35E of the Act and whether a separate notice under Section 11A of the Act to be issued within the time limit prescribed under Section 11A and before the proceedings under Section 35E of the Act are initiated and/or the notice under Section 11A of the Act shall precede the proceedings under Section 35E of the Act?

7.1 While considering the aforesaid issue it is required to be noted that as such in the present case the original authority while passing the O-I-O allowed the refund. That the order-in-original sanctioning the refund was the subject matter of review under Section 35E of the Act. On merits the Reviewing Authority set aside the order-in-original sanctioning the refund. Therefore, as such stricto sensu it can be said to be giving effect to the order passed under Section 35E of the Act. As such the assessee is claiming the refund on the basis of O-I-O sanctioning the refund which as such has been set aside in the proceedings under Section 35E of the Central Excise Act.

7.2 Now so far as the submissions made on behalf of the Assessee relying upon the decisions of the Tribunal in the case of Re-Rolling Mills (supra) and Bajaj Auto Ltd (supra) that for refund of the duty a separate show cause notice under Section 11A of the Act is reviewed and that too within the time limit prescribed under Section 11A and that as such notice under Section 11A must precede within the time limit prescribed under Section 11A before the notice under Section 35E of the Act is concerned, as such the aforesaid issue is now not res integra in view of the direct decision of this Court in the case of Asian Paints (India) Ltd. (supra).

7.3 In the case of Asian Paints (India) Ltd. (supra), the decision which has been rendered subsequent to the decision of the High Court in the case of Bajaj Auto Ltd (supra) it is observed and held as under:

"We have read the judgments of the larger Bench of the Customs, Excise and Gold (Control) Appellate Tribunal, which are impugned in these appeals. We are of the view that the judgments viewed Section 35-E and 11-A of the Central Excise Act in the proper perspective. The two sections operate in different fields and are invoked for different purposes. Different time-limits are, therefore, set out therein. We do not accept the contention that recovery of excise duty cannot be made pursuant to an appeal filed after invoking the provisions of Section 35-E, if the time limit provided in Section 11-A has expired. To so read the provisions, would be to render Section 35-E virtually ineffective, which would be impermissible."

7.4 Before this Court in the case of Asian Paints (India) Ltd. (supra) the judgments of the larger Bench of the Tribunal were under challenge. The Special Bench of the Tribunal took the view that Section 35E and Section 11A operate in different fields and are invoked for different purposes and different time limits are therefore set out therein. This Court in the case of Asian Paints (India) Ltd. (supra) specifically negated and/or did not accept the submission on behalf of the assessee that the recovery of excise duty cannot be made pursuant to an appeal filed invoking the provisions of Section 35E if the time limit under Section 11A has expired.

7.5 The law laid down by this Court in the case of Asian Paints (India) Ltd. (supra) as such was binding on the High Court and despite the same was pointed out and pressed into service by the Revenue before the High Court, the High Court has without giving any reasons how the same is misplaced has ignored to follow the decision of this Court in the case of Asian Paints (India) Ltd. (supra) and rather has followed its earlier decision in the case of Bajaj Auto Ltd (supra) which admittedly was prior to the decision of this Court in the case of Asian Paints (India) Ltd. (supra).

8. As observed hereinabove, once the order in original sanctioning the refund came to be set aside in a proceeding under Section 35E of the Act and the proceedings under Section 35E was initiated within the time prescribed under Section 35E of the Act, thereafter there is no question of any further notice under Section 11A of the Central Excise Act as observed by the Tribunal affirmed by the High Court on quashing and setting aside the order in original sanctioning the refund in exercise of powers under Section 35E of the Act which otherwise is prescribed under the Act within the time stipulated under Section 35E of the Act, thereafter necessary consequence shall follow and thereafter there is no question of any refund pursuant to order in original.

9. In view of the above and for the reasons stated above, present appeal succeeds. The impugned judgment and order passed by the High Court and that of the Tribunal are hereby quashed and set aside and the order passed by the Commissioner (Appeals), Mumbai dated 13.05.2005 is hereby restored.

However, in the facts and circumstances of the case there is no order as to costs.

From the above judgment of the Hon'ble Supreme Court, it is settled that when there is an order for sanction of refund and if at all the same is required to be recovered, it is that very order which is to be taken in appeal before the higher court otherwise, no recovery of the refund can be made by way of issuing another show cause notice and order for recovery in the said show cause notice. In the present case, when the refund sanctioning order has been upheld upto the CESTAT and no further appeal was preferred by the revenue, the revenue could not have proceeded for recovery by issuing a fresh show cause notice therefore, in view of the above Hon'ble Apex Court judgment, the action of the revenue for recovery of so called erroneous refund in the present case is absolutely illegal. Somewhat similar issue has been considered by the Hon'ble Madras High Court in the case of M/s. Eveready Industries India Ltd. v. CESTAT, Chennai - 2016-TIOL-676 HC- Mad-CX 2016 (337) E.L.T. 189 (Mad.). The issue that came up for consideration in the said case before the Hon'ble High Court was whether department can recover refund by invoking provisions of Section 11A without exercising the power of review under Section 35E and the order of refund not being reviewed by a superior officer. The Court referred to the case of Commissioner of Customs & Central Excise v. Panyam Cements & Mineral Industries Ltd. 2016 (331) E.L.T. 206 (A.P.), to observe that when no appeal was filed against order under Section 118, the department cannot take recourse to Section 11A. The Hon'ble Court held as follows:

"once an application for refund is allowed under Section 118, the expression erroneous refund' appearing in sub-section (1) of Section 11A cannot be applied. If an order of refund is passed after adjudication, the amount refunded will not fall under the category of erroneous refund so as to enable the order of refund to be revoked under Section 11A(1). One Authority cannot be allowed to say in a collateral proceeding that what was done by another Authority was an erroneous thing. Therefore, the question of law has to be answered in favour of appellant/assessee and the appeal deserves to be allowed."

The proposition laid in the case of M/s. Eveready Industries India (P) Ltd. is squarely applicable to the case in hand, the fact being identical. In view thereof, I hold that the impugned orders are not sustainable.

5.2 Without prejudice to the above finding, I find that in the present matter the Lower Authorities held that number of logs mentioned in the sales invoices do not match with the number of logs declared in the Bills of Entry in some cases. In some cases, number of logs have exceeded the log numbers than declared in the Bills of Entry and in some cases log numbers reduced as against declared in the Bills of Entry. However, I noticed that Appellants after importing logs, cut and sawn it in two or more pieces for transportation purpose as well as meeting with the requirements of the customers. Therefore, number of logs would increase than the declared in the Bill of Entry. Further Appellant sold logs in the same form or sawn form on CBM. They had never focused on

number of logs sold to customers. They Imported many consignments under various Bills of Entry. The Appellant sold goods based on CBM. Hence, in some of the cases, number of logs would have been decreased while selling the product. But, the Appellants sold duty paid imported logs on payment of VAT/ Sales Tax through sales invoices in domestic market. I also noticed that as per the Circular No. 6/2008-Cus dtd 28.04.2008, statutory auditor of the Appellants certified in each of the refund claim as under:-

- (1) Sales Tax/VAT has been paid on the goods in respect of refund was claimed;
- (2) Burden of 4% SAD has not been passed;
- (3) The amount of refund has been shown as receivable and reflected in balance sheet

5.3 Further, while the refund claim were sanctioned to the Appellants the Refund sanctioning authority also verified the said facts and also observed that the conditions of Notification fulfilled by the appellants. Hence, clearly in the present matter department erred in demanding sanctioned refund of SAD from the Appellants.

5.4 I also find that in the case of Agarwalla Timbers Pvt. Ltd. Vs Commissioner Of Customs, Kandla 2014 (299) E.L.T. 455 (Tri. Ahmd.) Tribunal held that the benefit of exemption Notification No. 102/2007 cannot be denied merely the imported goods were of logs whereas the same were sawn and sold in DTA. It was held that logs even after sawn, remains the same. The said decision was further challenged by the Revenue before the Hon'ble Gujarat High Court whereby the Hon'ble Gujarat High Court in case of Commissioner Of Customs Versus Variety Lumbers Pvt. Ltd. - 2014 (302) E.L.T. 519 rejected the Department's appeal by observing as under:

"32. From the above, it can be seen that though, at the time of import, the respondents brought into the country, raw logs or timber, and before selling it in the open market in India, cut them into smaller pieces by sawing, no new product, in our view, came into existence. Identity of the article did not undergo any fundamental change so as to conclude that what was imported by the respondents-importers was different from the item which ultimately was sold by them in the local market.

33. Second significant factor, which attracts our attention is that as stated by the counsel for the respondents, they were, under the law, obliged to reduce the length of the timber before its transport. RTO authorities would not permit transportation of the timber which is longer than 40 feet.

34. It is an undisputed position that the respondents imported the goods after paying SCVD. At the time of its sale in the local market, they also paid local taxes such as sales tax or the Value Added Tax as may be applicable. Before transportation of timber, they were required to reduce its size since the RTO rules did not permit transportation of logs longer than 40 feet. If only for cutting length of the logs, which were in excess of 40 feet, sawing operations were carried out and after some cleaning and scaring was done, timber logs of smaller pieces were sold, we do not see how respondents can be stated to have breached any of the conditions of the Exemption Notification dated 14-9-2007."

The above decision was further challenged by the Revenue whereby the Hon'ble Supreme Court dismissed the appeal preferred by the Revenue which has been reported in 2018 (360) E.L.T. 790 (S.C.). The Hon'ble Supreme Court observed in para 2 as under:

"2. The Learned Counsel for the appellant-Revenue has sought to dislodge the view taken by the Customs, Excise and Service Tax Appellate Tribunal and the High Court by contending that the subsequent sale must be in the same form in which the goods were received on import. The contention advanced on behalf of the appellant-Revenue is not supported by a plain reading of the exemption notification which even if construed in the strictest terms does not permit such a view to be taken. That apart, the materials on record clearly shows that for purpose of transit of logs, the same necessarily had be reduced in size due to conditions imposed by the State for transport/movement of timber. The said fact itself would belie the stand of the Revenue. We, therefore, take the view that a mere

conversion of imported logs in the Sawn Timber without loss of identity of the original product would not deprive the importer of the benefit of the exemption notification."

In this background, I find that the appellants are eligible for refund. Hence, The recovery of refund is unjustified.

5.5 Further as regard the contention of the revenue that sales invoices filed with the refund claims did not mention number of logs sold in the invoices whereas these invoices were correlated with the invoices seized under the Panchnama, mentioned details of the number of logs sold and therefore, it is alleged that the invoices submitted with the refund claim did not pertain to goods imported under that Bills of Entry for which they had claimed the refund. I find that the investigating authority to find out the truth of the said disputed transaction had not inquired with the customers to whom the Appellants sold the goods, therefore, allegations of the revenue is contrary to the facts. Appellants issued manual invoices to the customers and the same were filed with the refund claims. Refund sanctioning authority nowhere dispute the fact related to not mentioning details of number of logs sold to the customers. In the said matter there is no other disputes regarding sale of timbers to the customers after payment of ST/CST as well as compliance of the Notification No 102/2007 (supra). The Appellants complied with all the conditions of the above notification, and therefore, actions of the lower authorities for recovery of refund based on number of logs not mentioned in the invoices attached with the refund claim is not sustainable.

06. In view of the above discussion, I find no justifiable reason to uphold the impugned orders. The same are accordingly set aside and appeals are allowed with consequential relief to the appellants."

From the above Tribunal's order dated 12.04.2023. It can be seen that the issue and facts involved in the present case is absolutely identical to the facts and issue in the aforesaid case. The only difference is that the part of the same consignment was imported at Kandala port which was subject matter of the aforesaid case. In the present case the refund claim was filed at Mundra port. Therefore, the ratio of the aforesaid decision of this Tribunal is directly applicable in the present case.

5. Accordingly, in view of the aforesaid order of this Tribunal, in the present case the order for recovery of erroneous refund is incorrect and illegal which is not sustainable and the same is set aside. Appeals are allowed.

(Pronounced in the open court on 11.01.2024)

**RAMESH NAIR
MEMBER (JUDICIAL)**